IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No.2867 of 2007

Date of Decision: 9.10.2007

Shamsher Singh & Ors. ..Petitioners

Vs.

Zile Ram & Ors. ..Respondents

**Coram: Hon'ble Mr. Justice Vinod K.Sharma.**

Present: Mr.Ashok Aggarwal, Senior Advocate,
with Mr.R.S.Tacoria, Advocate,
for the petitioners.

Mr. V.B.Aggarwal, Advocate,
for respondent No.1.

Mr.Akshay Bhan, Advocate,
for respondents No.2 to 4.

**Vinod K.Sharma,J.**

This revision petition has been filed against the order dated 31.3.2006 passed by learned Civil Judge (Senior Division), Kurukshetra in execution petition No.94 of 2002.

Zile Ram and others moved execution application to execute

the judgment and decree in which the petitioners filed an application for dismissal of the said execution application on the plea that the decree holders had filed one Civil Suit No.1380 of 1990 seeking declaration as well as the relief of possession of land which was the subject matter of the decree which was under execution. Said suit filed by Zile Ram and others was dismissed on 7.6.1993 as the plaintiffs failed to produce any evidence.

It was claimed that the application moved for the restoration of the said suit was also dismissed. It was pleaded that in the said suit decree holders claimed that they had got possession of the suit land on 4.6.1981 in the execution of the decree vide Rapat Roznamcha No. 465 dated 4.6.1981 and therefore, present execution was not maintainable and thus liable to be dismissed. It was also the case set up that the objectors were not impleaded as party by the decree holders in spite of their having direct interest in the case. They claimed that their possession over the suit land was in their own right. It was further claimed that the objectors had not taken possession on the basis of mutation but in their own right. It was claimed that in the civil suit filed by the decree holders that the objectors had taken illegal possession of half land while possession of remaining half land was claimed by the decree holders. A plea of adverse possession was raised claiming that their possession for more than 12 years is adverse and hostile and they have become owners of the land which was the subject-matter of the present application.

On notice reply was filed by the decree holders and it was claimed that the objections raised were bad for want of locus standi,

maintainability and were barred by res judicata as well as were bad for non-joinder of necessary parties. It was claimed that the objectors had not come to the court with clean hands and they had no independent right. It was claimed that they drew their right from Ram Kala one of the objectors who had transferred the suit land in favour of the objectors during the pendency of the execution. The claim of Ram Kala was rejected by the High Court in the revision filed by the decree holders vide order dated 22.7.2002 and even SLP filed by Ram Kala was also dismissed.

On merit, it was admitted that the civil suit was dismissed in default, but it was claimed that the same was restored subject to payment of costs. On 5.10.1995 Bhartu and Balwant along with their father Ram Kala were proceeded ex parte in the suit for declaration in which an application was moved for setting aside the ex parte proceedings. Said proceedings were never set aside.

The objectors pleaded that the matter in controversy was decided by the court of Shri S.C.Dureja. The said order was challenged in the revision petition which was allowed by the High Court. It was also the case set up that Ram Kala grand-father and father of the applicant had filed civil suit titled Rama Kala Vs. Zila vide which the judgment and decree dated 28.12.1973 was challenged. The said suit as also dismissed on 21.3.1985 and it was claimed that in view of the findings the objectors had no right to file the present application. It was also claimed that symbolic possession was delivered to the respondents and the possession of the objectors was disputed. It was claimed that the objectors had no

independent right and therefore, were rightly not impleaded as party. It was claimed that they drew their title from Ram Kala. It was claimed that there was long and continuous litigation between the decree holders and Ram Kala and therefore, there was no question of adverse possession.

Learned Executing court was pleased to frame the following issues:-

1. Whether the applicant-objectors have become owners of the land in dispute and have their independent right as alleged? OPA
2. Whether the present application is not maintainable in its present form? OPR/DH
3. Relief.

The parties were allowed to lead evidence and the learned Civil Judge has been pleased to reject the plea raised by the objectors by recording findings as given here-under:

> " 15. ....Ram Kala the father and grand father of the present objectors filed the objections and lost his case up to the Hon'ble Supreme Court. During the pendency of the Revision Petition in the Hon'ble High Court the present objectors-applicants filed civil suits bearing No.110/87 and 621/93 titled as Bhartu etc. Vs. Ram Kala. Ex.DHW/6-A and B are the copies of plaint. Ex.DHW 10 and 11 are the copies of judgment and decree sheet dated 28.1.1987. Ex.DH 12 and Ex.DH 13 are the copies of the judgment and decree dated 19.10.1993. On the

basis of said decree mutation was entered and sanctioned in favour of present applicants which are Ex.DH 15 and 16. Thus, Ram Kala transferred the land in the name of his sons and grand sons during the pendency of the Revision Petition in the Hon'ble High Court. He lost his case up to the Hon'ble Supreme Court and filed a separate suit for declaration along with injunction which was also dismissed in default on 21.3.1985, vide order Ex.DH 6. The application for restoration of the suit which was dismissed in default on 21.3.1985 was filed by Ram Kala and that application was also dismissed on 7.5.2004 vide order Ex.DH7. He filed an appeal against the order dated 7.5.2004 but the same was also dismissed on 1.3.2005 vide order Ex.DH 8. When Ram Kala lost the case from every corner he got the present application and objections filed by his sons and grand sons who have no independent right. In other words, the present objectors derived their title through decree which was got suffered by Ram Kala on 28.1.1987 and 19.10.1993. He further submitted that all the entries in the revenue record and the electricity bills, ration card etc. placed on file by the applicants/objectors which were raised by Ram Kala. As the applicants derive their title from the decree suffered by Ram Kala in their favour, they are not in adverse possession and they have no right to set up their independent title. He further submitted that in the entire pleadings as well as in the evidence

the applicants/objectors have failed to prove their adverse possession. Mere long possession for a period of more than 12 years without intention to possess land adverse to the title of other parties does not result in acquisition of title by an adverse possession. The applicants have not mentioned the date and the year when they came in possession of the suit land. The objectors/applicants have miserably failed to prove the basic ingredients of adverse possession. There is no pleadings or evidence to show when adverse possession commenced or that it was hostile, open and peaceful. Learned counsel for the decree holders relied upon Saropp Singh Vs. Banto and others 2006 Apex court Judgments 91 (S.C.); Deva through L.Rs and others Vs.Sajjan & Kumar by L.Rs and others 2004 92 HRR 120 (SC); Karan Singh Vs. Bhim Singh and others 2006 (1) P.L.J. 151 (P&H); Bakshis Singh and another Vs. Madan Lal and others 2004 91) HRR 558, Gulwant Singh (died) through L.Rs Vs.Ajit Singh (died) through L.Rs 2004 (4) RCR (Civil) 389. The applicants have failed to prove when they came in possession of the suit land. Long litigation between the parties further prove that the possession of the applicants over the suit land is not open and hostile. He further submitted that the applicants have alleged that decree holders had filed a suit wherein they have admitted the possession of the objectors as illegal, unauthorised but that suit was dismissed and was not

heard on merits. He further submitted that it is well settled law that an admission of a party cannot prove a fact which is to be proved by leading evidence. In the present case, there is no evidence on record to prove the adverse possession of the applicants. He further submitted that the decree which was got suffered by Smt. Zando on 28.12.1973 does not require registration. Moreover there is no such pleading of the objectors in this regard and it is settled law that no point can be raised which is beyond pleading. In support of his arguments he relied upon Bant Singh Vs. Lakhbir Singh and others 2005 (2) CCC 496; Ranjit Singh Vs. Balbir Singh 2005 (1) RCR 466, Amteshwar Anand Vs. Virender Mohan Singh 2006 (1) SLJ 43. He further submitted that AW 12 Ramdhan Babbar submitted his report Ex.A-18. This report is not admissible nor can be taken into consideration as the thumb impression of alleged Zando was got compared by the Photostat copy, then his report submitted by him is not admissible as held in Kartar Singh Vs. Jaswant Singh 2005 (3) P.L.R.78. The objectors have no independent right in the suit land and the present execution is maintainable. The present application is not maintainable and is liable to be dismissed.

16. In the present application applicants/objectors claimed themselves to be owner in possession of the suit land. They have claimed themselves to be owners by way of adverse

possession and claimed that they have their independent right in the suit land do not come into the shoes of Ram Kala. So far as the plea of adverse possession is concerned, a person who claims adverse possession should plea and prove the basic ingredients (i) on what date he came into possession (ii) what was the nature of his possession (iii) whether factum of possession was known to the other party 9 (iv) how long his possession has continued and 9 (v) his possession was open and undisturbed. A person pleading adverse possession is trying to defeat the right of true owner. Hence, it is for him to clearly plea and establish all facts necessary to establish his adverse possession, as has been held in Sarup Singh Vs. Banto and others 2006 (i) Apex Court Judgments 91 (S.C.). So far as pleading is concerned, in the application, the applicants have pleaded that their possession over the suit land is continuous since more than 12 years and adverse, hostile and against everybody but they have not pleaded on what date they came into possession of the suit land. In Sultan Singh and others Vs. Smt. Kasturi and others 2005 (4) RCR (Civil)-50, it has been held that defendants claiming adverse possession must plea the necessary basic ingredients required by law and prove adverse possession at commencement and hostile, open and peaceful for the requisite period. The applicants have examined as many as three witnesses to prove their long, open, undisturbed,

continuous possession. AW 4 Jagat Ram, AW 5 Dharam Singh and AW 6 Bharat Singh deposed about the possession of the applicants over the suit land for the last 24/25 years as owners but none of them deposed on what date the applicants came into possession of the suit land and that their possession was open and undisturbed. No doubt the decree holders in the plaint of civil suit No.1380/90 Ex.A.6 pleaded that the present objectors have illegally taken the possession of the suit land but that does not mean that the D.H. have admitted the adverse possession of the applicants over the suit land. A perusal of para No.8 of the plaint Ex.A.6 reveals that the present decree holders pleaded that the present applicants have illegally obtained possession on the basis of wrong mutation. It means the decree holders have not admitted the possession of the applicants in their own independent right. There is no admission of the decree holders regarding adverse possession of the applicants over the suit land. In order to prove the adverse possession the applicants should themselves prove the basic ingredients. Moreover, the civil suit No.1380/90 was dismissed and was not heard on merit. The applicants have prove that the decree holders were aware of the possession of the applicants over the suit land but they failed to prove that their possession was open, undisturbed and hostile. The chain of litigation between the parties prove that the possession of the applicants over the suit

land is not hostile and undisturbed. As the applicants failed to prove the basic ingredients, they fail to prove that they have become owner of the suit land by way of adverse possession. Further the applicants are the sons and grand sons of Ram Kala. The objectors derive their title through the decrees Ex.DH II and DH 13 dated 28.1.1987 and 19.10.1993 which were got suffered by Ram Kala. Ram Kala transferred the land in the name of his sons and grand sons, who are present objector/applicants through civil suits. Ex.DHW-6/a and b are the copies of the plaint Ex.DH 10 and DH 12 are the copies of judgments dated 28.1.1987 and 19.10.1993 and Ex.DH 11 and 13 are the copies of decree sheets. On the basis of these decrees mutations were entered and sanctioned in the name of present applicants which are Ex.DH 15 and DH 16. Hence, also the contention of the applicants that they have their independent title in the suit land is far from truth. Thus,the applicants failed to prove their ownership by way of adverse possession and their independent title in the land.

17 .....So far as maintainability is concerned, learned counsel for the applicants have submitted that the decree on the basis of which present execution was filed is a nullity, as the same is not registered one. No family settlement took place. There is no pleadings on behalf of the applicants in this regard and it is well settled principle of law that no point can be raised at the

time of arguments, which is beyond pleadings. Father and grand father of present applicants Ram Kala disputed and questioned the decree dated 28.2.1973, in the objections filed by him and Ram Kala contested the objections up to Hon'ble Supreme Court but cold not succeed. The decree has become final and the applicants cannot reopen the issue. So far as delivery of symbolic possession vide rapat no.465 dated 4.6.1981 is concerned symbolic possession was delivered to the decree holders. This plea was also taken by Ram Kala at the time of filing his objections Ram Kala has also taken the plea that second execution is not maintainable as the present execution is hit by the principle of res judicata but his plea was not accepted and he lost his battle up to the Hon'ble Supreme Court; Transfer of suit land by Ram Kala in favour of his sons and grand sons during the pendency of execution is hit by the principle of lis pendence and the applicants are bound by the fate of the said Ram Kala. The present application filed by them is not maintainable and hence, both these issues are decided against the applicants."

The petitioner preferred an appeal against the said order. Said appeal was dismissed by the learned Additional District Judge (Fast Track), Kurukshetra by observing as under:-

"19. It would be obvious by now that present appellants who made the application before the learned trial court culminating

> in the impugned judgment were transferees. The transaction of transfer by way of decree took place after the passing of the decree and during the pendency of the execution proceedings. They did not have a right to raise the objections by way of filing the application nor they had any right to execution of the decree. Whether the second execution petition was maintainable or not shall be a question to be decided by the Executing Court but its order regarding dismissal of the application of the present appellants does not suffer from any flaw or illegality or even irregularity. In view of Order 21 Rule 102, the appellants being transferees pendente' lite could not seek the relief claimed which was regarding dismissal of the execution petition."

Mr. Ashok Aggarwal, learned senior counsel appearing on behalf of the petitioner referred to the civil suit filed by Zile Ram and another against Ram Kala and others for declaration and consequential relief of possession to contend that in the said suit it was pleaded that the possession has been taken by the respondents forcefully and therefore, in view of the said admission the possession of the petitioner stood proved to be hostile from the year 1980 onwards and therefore, learned Executing Court was not correct in dismissing the objections filed by the petitioner. However, this plea prima facie cannot be accepted as the said suit was filed against Ram Kala in which Shamsher Singh, Jasmer Singh, Subhash and Balwant Singh were impleaded as party where they were shown to be the

minors. Learned Trial Court, therefore, was totally justified in rejecting the plea of adverse possession when the petitioners were claiming their title through Ram Kala. The contention of the learned counsel for the petitioners that their possession was not on the basis of mutation but adverse was rightly rejected.

Learned senior counsel further contended that merely because Ram Kala father and grand-father of the objectors was unsuccessful up to Hon'ble Supreme Court could not be a ground to reject their plea. The main contention of the learned Senior Counsel was that the learned lower appellate court was not justified in dismissing the appeal being not competent by treating it to be an objection of the judgment debtor. The contention of the learned senior counsel for the petitioners therefore, was that these were third party objections which had to be decided on merit and therefore, the case deserves to be remanded to the learned lower appellate court for adjudication on merit.

Mr. Akshay Bhan, learned counsel appearing for the respondents, however, submitted that it is not open to the petitioners to challenge the order passed by the learned Additional District Judge as in para No.13 of the grounds of revision it has been clearly mentioned that the appeal was filed on the basis of wrong advice. Para No.13 of the grounds of revision reads as under:-

> “13. That on the wrong advice, the petitioners filed appeal against the impugned orders before the District Judge, Kurukshetra who vide order dated 13.2.2007 dismissed the

appeal as not maintainable. Certified copy of the order passed by the Additional District Judge, Kurukshetra is attached herewith as Annexure P.6."

Learned counsel for the respondents further argued that in any case the order passed by the learned Additional District Judge, cannot be faulted with as it is not always that the Executing Court has to adjudicate on the objections in detail, as in case the objections are found to be frivolous the same can be summarily rejected. The contention of the learned counsel for the respondents was that the present objections were, in fact, not maintainable as the petitioners were drawing their title from Ram Kala and objections raised by them had earlier been dismissed. The learned counsel for the respondents also made reference to the findings recorded by the Executing Court holding that the petitioners have failed to prove their adverse possession.

Learned counsel for the respondents also argued that if the order passed by the learned Additional District Judge is under challenge then also the present revision would not be competent as in that event appeal would lie against the said order in view of the law laid down by Hon'ble Kerala High Court in the case of **Girjijambika Vs. George Selvaraj 2003 (4) RCR (Civil) 496**. In paras No.4 and 6 of the said judgment it has been held as under:-

"4. In *Bhanwar Lal Vs. Satyanarain, (1995) SCC 6: 1995 (1) RRR 504 (SC)* the Supreme Court held as follows:

"Under these circumstances the appellate court, though for

different reasons was justified in directing an enquiry to be conducted for removal of the obstruction or resistance caused by Satyanarain under Order XXI Rule 35 (3) and 97(2) and Order XXI, Rules 101 and 102 of CPC".

Following the decision in Bhanwar Lal's case (supra), the Apex Court considered the remedy available to a party against whom an order under O XXI, Rule 102 was passed. In **Babulal Vs. Raj Kumar, (1996) 3 SCC 154: 1996 (2) RRR 109 (SC)** the Apex Court held as follows:

"The controversy is no longer res integra. This Court in **Bhanwar Lal Vs. Satyanarain, (1995) 1 SCC 6** considered the controversy and had held that even an application filed under Order XXI, Rule 35 (3) or one filed under Section 47 would be treated as an application under Order XXI, Rule 97 and an adjudication is required to be conducted under Rule 98. Dispossession of the applicant from the property in execution is not a condition for declining to entertain the application. The reasons are obvious. The specific provisions contained in Order XXI, Rule 98, 101, 102 enjoin conduct of a regular adjudication, finding recorded thereon would be a decree and bind the parties".

It was specifically found that the provisions contained in Rule

102 enjoins conduct of a regular adjudication. Finding recorded thereon would be a decree. In view of the principle laid down in Babulal's case (supra), the remedy available to the petitioners is to file regular appeal against the decision of the Executing Court and not revision before this Court.

6. The learned counsel has relied on the decision reported in **Zinda Ram Vs. Ramrup Das (AIR 1935 Patna 231), Usha Jain Vs. Manmohan (AIR 1980 M.P. 146), Kuruvilla Vs. Kesavan (1980 KLT 364), Santilata Vs. Nanda Kishore (AIR 1981 Calcutta 219), Chandrika Vs. Gangadharan (1983 KLT 953), C.R.Raman Vs. Karthikayan (AIR 1984 Kerala 208), M.M.Jamadhar Vs. Amirbi (AIR 1985 Karnataka 91)** and C**houthmal Vs. Sunderlal (AIR 1992 M.P. 192)** and argued that a reading of all the above stated decisions of various High Courts shows that an appeal will lie only from the orders passed under Rules 97 and 99 in view of the provisions contained in Rule 103. In none of the decisions cited by the counsel for the revision petitioners the remedy available to a party against whom an order under Rule 102 was passed was considered. So, the principles laid down in the above said decisions have no application to the facts of these cases. In view of the decision of the Apex Court in Babu Lal's case (supra), the remedy available to the revision petitioners against an order passed under Rule 102 is to file an appeal and

not a Civil Revision Petition before this Court. So, these Civil Revision Petitions are not maintainable.

In the result, the Civil Revision Petitions are disposed of as not maintainable."

Learned counsel for the respondents also contended that the objection petition filed by the petitioners was not competent, as their predecessor-in-interest had failed in the objections. For this purpose reliance was placed on the judgment of Hon'ble Supreme Court in the case of **R.P.A.Valliammal Vs. R.P.Palanichami Nadar and ors. 1997 (1) All India Land Laws Reporter 252, wherein it was held as under:-**

"Civil Procedure Code, 1908- S.47.O21, R.90 (3)- Execution of decree-- Objections, if any, can be raised once only and that also at the earliest-- Cannot be raised subsequently-- Title of owner negatived earlier could not be raised by the heir."

Reliance was also placed on the Full Bench judgment of Hon'ble Andhra Pradesh High Court in the case of **Gurram Seetharam Reddy Vs. Gunti Yashoda and another 2005 (2) Civil & Rent Judicial Reports 160** wherein in para No.42 it has been held as under:-

"42. For the foregoing reasons,we hold that:

a) Against the orders passed under Rule 58 (3) and Rules 98 and 100 of Order 21, C.P.C. regular appeals under Section 96 and not miscellaneous appeals under Section 104 read with Order 43, Rule 1 C.P.C. are maintainable and that the judgment of this Court in Nookaraju's case (supra) does not represent

the correct position of law.

b) The Court fee payable on such appeals shall be the one calculated in accordance with Articles 11 (i) or 3 (i) of Schedule II of Court Fees Act, as the case may be read with Section 49 of the A.P.Court Fees and Suits Valuation Act.

c) A second appeal under Section 100, C.P.C. is maintainable against an order passed in an appeal, arising out of order passed under Rule 58 (3) or Rule 98 and 100 of Order 21 C.P.C."

There is force in the contentions raised by the learned counsel for the respondents.

Present revision petition is not competent and even otherwise devoid of merit as the learned Executing Court has rightly come to the conclusion that the petitioners have failed to prove their ownership by adverse possession. The possession of petitioners was on the basis of mutation on account of transfer by Ram Kala. The learned lower appellate court also rightly held that the objections were not competent.

The revision petition being without any merit is ordered to be dismissed.

**(Vinod K.Sharma)**
**Judge**

**9.10.2006**
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